In the Matter of CLYDE MALLORY LINES *and* INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, LOCAL NO. 22

Case No. R-1329.—Decided October 10, 1939

Shipping Industry—Investigation of Representatives: controversy concerning representation of employees: rival organizations—*Contract:* renewed subsequent to filing of petition; held no bar to determination of representatives—*Unit Appropriate for Collective Bargaining:* employees engaged in general maintenance and repair of ships or piers, including deck department shore gang, boiler scalers, carpenters and helpers, sailmakers and assistants, tinsmiths, electric truck mechanics and helpers, batterymen, night donkeymen, storekeeper, and sweepers, exclusive of supervisory employees; current bargaining contract not determinative of; heterogeneous, non-craft groups; inclusion of employees represented by another union; inclusion of employees who would otherwise be unrepresented; controversy as to—*Election Ordered*

Mr. Will Maslow, for the Board.

Burlingham, Veeder, Clark & Hupper, of New York City, by *Mr. Burton H. White*, for the Company.

Boudin, Cohn & Glickstein of New York Coty, by *Mr. Leonard B. Boudin*, for the Industrial Union.

Phillips, Mahoney & Fielding, of New York City, by *Mr. W. E. Goldman*, for the I. L. A.

Mrs. Evelyn Neilson Cooper, of counsel to the Board.

DECISION

AND

DIRECTION OF ELECTION

STATEMENT OF THE CASE

On February 16, 1938, Industrial Union of Marine & Shipbuilding Workers of America, Local No. 22, herein called the Industrial Union, filed with the Regional Director for the Second Region (New York City) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Agwilines, Inc., in the operation of Clyde Mallory Lines,[1] New York City, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein referred to as the Act. On April 19, 1938,

[1] In the petition, the Company was erroneously designated as the Clyde Mallory Lines. This error was corrected by stipulation between the parties.

the National Labor Relations Board, herein referred to as the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice. In pursuance of Article III, Section 10 (c) (2), and Article II, Section 37 (b), of said Rules and Regulations, the Board further ordered that the instant case be consolidated for the purposes of hearing with a second case involving a charge of unfair labor practices which the Industrial Union had filed with the Regional Director simultaneously with its filing of the above-mentioned petition.

On May 10, 1938, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company, upon the Industrial Union, and upon the International Longshoremen's Association, Local No. 1474, herein referred to as the I. L. A., a labor organization claiming to represent employees directly affected by the investigation. After several postponements of the hearing, the Board, on March 20, 1939, in accordance with Article II, Section 37 (b), and Article III, Section 10 (c) (2), of said Rules and Regulations, ordered the instant case severed from the above-mentioned second case involving a charge of unfair labor practices and ordered that the instant case be continued as a separate proceeding. Said second case was subsequently closed. On March 22, 1939, the Regional Director issued a further notice of hearing, copies of which were duly served upon all parties. Pursuant to notice, a hearing was held March 27, 28, 29, and 30, 1939, at New York City, before Edward G. Smith, the Trial Examiner duly designated by the Board. The Board, the Company, the Industrial Union, and the I. L. A. were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the course of the hearing, the Trial Examiner made several rulings on motions and on objections to the admission of evidence. Thereafter, the Industrial Union filed a brief with the Board; the I. L. A. waived the right to do likewise. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Company [2]

Agwilines, Inc., is a corporation duly organized and existing under the laws of the State of Maine, having its principal office and place

[2] The facts pertaining to the business of the Company are derived from stipulations between the parties.

of business in New York City. Clyde Mallory Lines is a trade name under which Agwilines, Inc., as one branch of its activities, operates 16 vessels in coastwise trade between New York, Boston, and South Atlantic and Gulf ports. The New York terminal of the Clyde Mallory Lines Division is located on the North River. About 75 workers are there employed by the Company in the maintenance and repair of ships and docks.

The Company has stipulated, and we find, that in the operation of Clyde Mallory Lines it is engaged in transportation and commerce as defined in Section 2 (6) and (7) of the Act.

II. THE ORGANIZATIONS INVOLVED

Industrial Union of Marine & Shipbuilding Workers of America, Local No. 22, is a labor organization, affiliated with the Congress of Industrial Organizations, whose membership includes ship maintenance and repair employees of the Company, excluding supervisory employees.

International Longshoremen's Association, Local No. 1474, is a labor organization affiliated with the American Federation of Labor, admitting to its membership workers engaged in the maintenance and repair of ships and piers.

III. THE QUESTION CONCERNING REPRESENTATION

The Industrial Union and the I. L. A. each began its organizational activity among the Company's employees engaged in ship or pier maintenance and repair work in June 1937. On February 5, 1938, the Industrial Union by letter requested the Company to negotiate with it on behalf of the ship workers, exclusive of the pier workers.[3] This request was not answered by the Company. On February 11, 1938, the Company entered into a preferential-shop agreement with the I. L. A., constituting the latter the exclusive bargaining agent for employees engaged in maintenance work on its ships and on its piers in the Port of New York. The terms of the agreement provided that it should be effective until October 31, 1938, and self-renewing thereafter from year to year unless terminated by either party on the annual expiration date by thirty (30) days' prior written notice. On February 16, 1938, the petition was filed by the Industrial Union.

The first notice of hearing in this proceeding was served upon the Company and the I. L. A. on May 10, 1938, more than 5 months prior to the renewal date of the contract. Neither the Company nor the

[3] A copy of a letter allegedly sent by the Industrial Union to the Company in August 1937, in which a similar request was made, was introduced into evidence. The Company denied receiving the August 1937 letter.

I. L. A. thereafter gave notice of termination of the contract. Both parties contend that the contract was automatically renewed on November 1, 1938, for another year ending October 31, 1939. The I. L. A. contends further that the contract is a bar to the investigation and certification sought by the Industrial Union. Since, however, the renewal of the contract was effected during the pendency of this proceeding, we find that it does not now operate as a bar to a determination of representatives.[4]

We find that a question has arisen concerning the representation of the Company's employees.

IV. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company described in Section I above, tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE APPROPRIATE UNIT

The Industrial Union claimed that all of the Company's employees engaged in the maintenance and the repair of ships, including the deck department shore gang, the boiler scalers, and the workers employed on the "carpenters and sailmakers" pay roll (which includes carpenters, carpenters' helpers, sailmakers, sailmakers' assistants, and tinsmiths), but excluding supervisory employees, constitute the "shore gang" and, as such, the appropriate bargaining unit. In partial support of this position, reference was made to outstanding contracts between the Industrial Union and 10 other companies in the Port of New York in which ship maintenance and repair workers are designated as the bargaining unit. The Industrial Union claimed, on the other hand, that certain other groups of employees mentioned during the hearing do no ship maintenance and repair work and should, therefore, be excluded from the bargaining unit: (1) workers on the "mechanics, etc." pay roll (which includes electric truck mechanics and helpers, batterymen, storekeeper, and night donkeymen); (2) sweepers employed on the "dock" pay roll; and (3) the steward's department shore gang.

The I. L. A. made no contention for a bargaining unit different from that constituted by its contract. The contract covered certain categories of employees engaged in maintenance and repair work on

[4] *Matter of American France Line, et al. (Shepard Steamship Company)* and *International Seamen's Union of America*, 7 N. L. R. B. 79; *Matter of Unit Cast Corporation* and *Steel Workers Organizing Committee*, 7 N. L. R. B. 129; *Matter of Pacific Lumber Inspection Bureau, Inc.* and *Northwest Lumber Inspectors Union, Local No. 20877*, 7 N. L. R. B. 529.

the ships and on the piers: boiler scalers; employees on the "carpenters and sailmakers" pay roll, excepting the carpenters; employees on the "mechanics, etc." pay roll, excepting the donkeymen; and, of the maintenance employees on the "dock" pay roll, only the sweepers. It excluded entirely the deck department shore gang and the steward's department shore gang.

The Company agreed to the exclusion of supervisory employees from the unit but contested the inclusion of the deck department shore gang. It argued that the latter group was functionally related to the sea-going sailors rather than to the shore gang of maintenance and repair workers and that the National Maritime Union, the recognized bargaining representative for the Company's sea-going personnel, had sought also to bargain for the deck department shore gang. During the hearing, officials of the National Maritime Union testified on behalf of their organization that it did not represent and had never claimed to represent the deck department shore gang, and we so find.

The parties are in agreement, therefore, as to the inclusion within the bargaining unit of the boiler scalers and the employees on the "carpenters and sailmakers" pay roll, with the exception of the carpenters, both of which groups are engaged in the maintenance and repair of ships. They are also in agreement as to the exclusion of the steward's department shore gang and supervisory employees. Since none of the parties expressed a desire to have the steward's department shore gang included in the unit, since it is a working group separate from the maintenance employees and since it is represented by another I. L. A. local, we shall not include it in the unit. The parties are in disagreement, however, as to the inclusion within the bargaining unit of the deck department shore gang; carpenters; employees on the "mechanics, etc." pay roll, excepting the donkeymen; and sweepers.

Despite the I. L. A.'s contract covering a miscellaneous unit, the past bargaining history in this case does not afford an adequate basis for determination of the unit. It is apparent from the record that the demarcations by which the I. L. A. sought to justify the exclusion of certain categories of ship and pier workers and by which the Industrial Union sought to segregate the ship from the pier workers are arbitrary ones, founded on the fortuitous organizational development of the two labor organizations. It is equally apparent that there is no warrant for the segregation of the deck department shore gang from the other ship workers, as urged by the Company.

The various categories of employees involved comprise a heterogeneous group of general maintenance workers. That the duties of some are performed on or in connection with the piers, rather than

on or in connection with the ships, is not considered to be controlling. No one category or combination of categories constitutes a distinctly separate employee group. On the contrary, there is an overlapping of duties and of supervision between the categories of pier workers on the one hand and some of the categories of ship workers on the other. Substantially similar wages, hours, and other working conditions govern both the pier and the ship employees. The feasibility of collective bargaining on behalf of both groups as a single unit has been demonstrated by the contractual relations under the I. L. A.'s agreement. These circumstances lead us to the conclusion that all of the employees engaged generally in maintenance and repair work, whether on the ships or on the piers, can appropriately be included in one bargaining unit.[5]

This conclusion applies to the carpenters who are engaged essentially in ship work, to the storekeeper and donkeymen who are employed with pier workers on the "mechanics, etc." pay roll, and to the sweepers who are employed on the piers. The fact that the carpenters are represented by another I. L. A. local does not warrant their exclusion from the appropriate unit. Unlike the steward's department shore gang, the carpenters do not constitute a separate working group of employees; moreover, they have been admitted to membership in the I. L. A. local here involved. Although the storekeeper and donkeymen may not be engaged as strictly in maintenance and repair work as are other pier workers, we see no reason to remove them from their employee unit, and thus to leave them without representation, particularly since the storekeeper has been considered one of the pier-maintenance and repair employees for the purposes of the I. L. A.'s contract. The sweepers share the above-mentioned elements of mutuality common to the ship workers and other pier workers except in so far as they are under separate supervision, are paid on a weekly rather than an hourly basis, and work irrespective of the presence of the ships and, hence, more regularly. In view of all the circumstances, we are of the opinion that the sweepers should be included in the unit.

It is objected that the Board has no authority to alter the unit as fixed by the contract between the Company and the I. L. A. The majority of the Board has already indicated that the existence of a previous contract does not necessarily fix the appropriate bargaining unit, but is merely one element in the total situation to be considered along with many other relevant factors.[6] The unfortunate result of arbitrarily fixing the bargaining unit by reference only to the unit

[5] Cf. *In the Matter of United Fruit Company* and *Industrial Union of Marine & Shipbuilding Workers of America, Local 22*, 9 N. L. R. B. 591.

[6] See the concurring opinion of Mr. Edwin S. Smith and the dissenting opinion of Chairman Madden in *Matter of American Can Company* and *Engineers Local No. 30 et al.*, 13 N. L. R. B. 1252.

established in a previous contract is well illustrated by the instant case. Here both the I. L. A. and the Industrial Union began to organize the Company's employees at approximately the same time. Prior to the execution of any contract each union requested the Company to negotiate with it as representative of the employees in that particular unit which each claimed to be appropriate. The Company chose to execute the contract with the I. L. A. and ignored the contentions of the Industrial Union. Under such circumstances it seems plainly unfair to hold that the I. L. A. contract fixes in perpetuity the appropriate bargaining unit. We therefore must consider all the factors in the case and in light of all the circumstances determine what unit will "insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise . . . effectuate the policies of this Act."

We find that the Company's employees engaged generally in the maintenance and repair of ships or piers, namely: the deck department shore gang, boiler scalers, carpenters, carpenters' helpers, sailmakers, sailmakers' assistants, tinsmiths, electric truck mechanics and helpers, batterymen, storekeeper, night donkeymen, and sweepers, exclusive of supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, and that said unit will insure to the employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

VI. THE DETERMINATION OF REPRESENTATIVES

The Industrial Union and the I. L. A. each submitted substantial card proof of membership. Some of the cards were unsigned, others were undated, while many had been secured more than 2 years ago when the organizational drives of both unions were first begun. In addition, there are a number of duplications as between the cards of the two organizations. Under these circumstances, the question of representation which has arisen can best be resolved by an election by secret ballot [7] among the employees to determine whether they desire to be represented by the Industrial Union, or by the I. L. A., or by neither. We shall direct accordingly.

The Company's pay rolls dated February 10 through March 16, 1939, are in evidence. The Industrial Union requested an election among the employees in the appropriate unit listed on such pay rolls. The I. L. A., though relying on its asserted contract, claimed

[7] See *Matter of The Cudahy Packing Company* and *United Packinghouse Workers of America, Local No. 21, of Packinghouse Workers Organizing Committee, affiliated with the Congress of Industrial Organizations*, 13 N. L. R. B. 526; *Matter of Armour & Company* and *United Packinghouse Workers Organizing Committee, etc.*, 13 N. L. R. B. 567.

that in the event of an election only those persons employed by the Company for 10 or 15 days in any month preceding the filing of the petition should be considered eligible to vote.

Because of the lapse of time since the filing of the petition and because of the turn-over among the less regularly engaged employees, we are of the opinion that a more current pay roll than that proposed either by the Industrial Union or by the I. L. A. should serve as the basis for the election. We shall therefore direct that the employees eligible to vote shall be those employees in the appropriate unit, as defined in Section IV above, who have worked 5 or more days during the month immediately preceding this Direction.

On the basis of the above findings of fact and upon the entire record of the case, the Board makes the following:

Conclusions of Law

1. A question affecting commerce has arisen concerning the representation of employees of Agwilines, Inc., in the operation of Clyde Mallory Lines, New York City, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. The employees of the Company engaged generally in the maintenance and repair of ships or piers, namely: the deck department shore gang, boiler scalers, carpenters, carpenters' helpers, sailmakers, sailmakers' assistants, tinsmiths, electric truck mechanics and helpers, batterymen, storekeeper, night donkeymen, and sweepers, exclusive of supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 2, it is hereby

Directed that, as part of the investigation authorized by the Board to ascertain representatives for the purposes of collective bargaining with Agwilines, Inc., in the operation of Clyde Mallory Lines, New York City, an election by secret ballot shall be conducted as early as possible but not later than thirty (30) days from the date of this Direction of Election, under the direction and supervision of the Regional Director for the Second Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among the employees of Agwilines, Inc., in the operation of Clyde

Mallory Lines, engaged generally in the maintenance and repair of ships or piers, namely: the deck department shore gang, boiler scalers, carpenters, carpenters' helpers, sailmakers, sailmakers' assistants, tinsmiths, electric truck mechanics and helpers, batterymen, storekeeper, night donkeymen, and sweepers, exclusive of supervisory employees, who have worked 5 days or more during the month immediately preceding this Direction, to determine whether they desire to be represented for the purposes of collective bargaining by the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 22, affiliated with the C. I. O., or by the Industrial Longshoremen's Association, Local No. 1474, affiliated with the A. F. of L., or by neither.

MR. WILLIAM M. LEISERSON, dissenting:

I cannot agree with the majority decision concerning the appropriate unit in this case. It is true, as the decision states, that the current contract between the Company and the I. L. A. is no bar to an election to determine representation. But this contract, since it fixes an appropriate bargaining unit, is a bar to permitting other employees not covered by the contract to vote in an election for the purpose of choosing a new representative. It seems to me that simple fairness requires that only those in an appropriate unit under an existing contract shall decide if they desire a change in representation.

A bargaining unit legally established by a valid collective agreement is for industrial elections what a Congressional district is for political elections. If a board of elections undertook to add to the voters of one Congressional district parts of the voters of two other districts it would be doing what the majority decision is ordering in the present case.

The decision not only disregards the existing appropriate unit as established by the collective bargaining contract between the I. L. A. and the Company, but it also disregards the appropriate unit proposed by the Industrial Union, whose members are organized to bargain for employees on a somewhat wider basis than the I. L. A. Both of these units the majority of the Board characterizes as "arbitrary" (and) "founded on the fortuitous organizational development of the two labor organizations," and it creates a new bargaining unit which neither the employer, the employees, nor their organizations consider appropriate but which the two Board members consider more effective for collective bargaining.

The plain intent of the National Labor Relations Act seems to me to be that the Board, in determining the bargaining units, shall be bound by the units that have been developed by the employees them-

selves through their organizational efforts and the development of their collective bargaining with employers. I cannot believe that Congress intended that the necessarily theoretical opinions of individual Board members as to what units would prove most effective for collective bargaining should be imposed on employees and labor organizations against their will.

It is the units established by Board members on the basis of their own opinions as to appropriateness that seem to me to be arbitrary and fortuitous, whereas those developed in the process of labor organization and collective bargaining are the practical and workable units which form the basis for sound labor relations wherever collective dealing between employees and management prevails.

Where, as in this case, two employees' organizations differ as to appropriate units, and one has succeeded in establishing and maintaining a unit by a collective agreement with the employer, the duty of the Board is plain. A vote should be ordered among the employees included in the unit covered by the contract, and a separate vote should be taken among the employees whom the petitioning organization claims to represent but who are not now included in the contractual bargaining unit. Then, if one organization wins both elections it will be free to combine all the employees in a single unit under a new contract with the employer. In this way the employees by their own free choice are in a position to establish, maintain, or alter their bargaining units in accordance with their own ideas of appropriateness and through the process of bargaining and making agreements with their employers.